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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TRAFALGAR CAPITAL ASSOCIATES, INC.,
in its capacity as Managing General Partner of
Heywood Wakefield Associates Limited Partnership,
Petitioner,

v.

ANDREW CUOMO
in his capacity as Secretary of United States
Department of Housing and Urban Development,
EXECUTIVE OFFICE OF COMMUNITIES AND DEVELOPMENT,
and RURAL HOUSING IMPROVEMENT, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the unambiguous Congressional prohibition in 42 U.S.C. § 1437f(c)(2)(C) that the Secretary of the United States Department of Housing and Urban Development ("HUD") "may not reduce contract rents in effect on or after April 15, 1987," forbid after that date reductions by HUD in previously authorized contract rent commitments to owners?

2. Is HUD bound by a duly delegated decision of its Regional Administrator committing to rents for projects funded under the Section 8 Moderate Rehabilitation Program, or may HUD repudiate that decision nine years later by simply declaring the decision incorrect?

3. Is a claim, to require HUD to use 1986, not 1985, Fair Market Rents ("FMRs") to calculate payments, timely filed, if filed within the applicable limitations period following execution of the final Housing Assistance Payments Contract, where HUD delayed almost a year in issuing the 1986 FMRs contrary to the Congressional mandate in 42 U.S.C. § 1437f(c)(1) that HUD publish FMRs "at least annually"?

STATEMENT REQUIRED BY RULE 29.6

Plaintiff, Trafalgar Capital Associates, Inc., has no parent company and no nonwholly owned subsidiaries.

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**On Petition for a Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The July 16, 1997 decision of the United States District Court for the District of Massachusetts is reported at 973 F. Supp. 214 and is included in the appendix at pages 36a - 52a. The District Court's Order is contained in the appendix at page 53a.

The October 29, 1998 panel decision of the United States Court of Appeals for the First Circuit is reported at 153 F.3d 21 and is included in the appendix at pages 3a-33a. The Judgment of the Court of Appeals is contained in the appendix at page 34a. The December 30, 1998 Order of the Court of Appeals denying Petitioner's request for rehearing and suggestion for rehearing en banc is contained in the appendix at pages 1a- 2a.

JURISDICTION

The United States Court of Appeals for the First Circuit entered judgment on October 29, 1998. A petition for rehearing and suggestion for rehearing en banc was timely filed on December 14, 1998. The Court of Appeals denied the petition for rehearing on December 30, 1998. Accordingly, the jurisdiction of this Court is timely invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 42 U.S.C. §§ 1437f(c)(1), 1437f(c)(2) and 1437f(e). They are set out in the appendix at pages 54a-60a. The pertinent part of § 1437f(c)(2)(C) which is particularly involved reads:

> The Secretary may not reduce the contract rents in effect on or after April 15, 1987, for newly constructed, substantially rehabilitated, or moderately rehabilitated projects assisted under this section (including projects assisted under this section as in effect prior to November 30, 1983), unless the project has been refinanced in a manner that reduces the periodic payments of the owner.

STATEMENT OF THE CASE

Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f, set up a system of housing assistance payments, among other goals, to encourage private investors to rehabilitate housing and aid lower income families in renting those units. The Section 8 Program for over twenty years has constituted the major federal program for inducing private enterprise to participate with the federal government in the provision of housing for lower income persons.

The Petitioner, Trafalgar Capital Associates, Inc. ("Trafalgar"), is the Managing General Partner of Heywood Wakefield Associates Limited Partnership, the owner of a 171-unit multifamily rental housing project (the "Project") located in Gardner, Massachusetts.

Trafalgar entered into a final Housing Assistance Payments Contract ("the HAP Contract") on April 17, 1990, under the Section 8 Moderate Rehabilitation Program, § 1437f(e)(2), as then in effect, ("the Program"), covering 123 of its 171 units. The HAP Contract sets contract rents for those units. Eligible tenants only pay rent based on a percentage of their income. HUD makes a monthly housing assistance payment to the owner, representing the difference between what the tenant pays to the owner and the contract rent.

This Petition involves efforts by the Secretary of the Department of Housing and Urban Development ("HUD") to reduce the level of an existing HUD commitment to make periodic housing assistance payments under the Program. HUD has also tried to avoid having to increase contract rents as mandated by applicable HUD requirements and, thus, payments to Petitioner. HUD argues that it can offset these required increases in the Project's initial contract rents by deducting for alleged errors it

claims to have found several years after HUD's initial determination of the maximum for contract rents. While HUD asserted the need to "correct" the alleged errors, HUD conceded it did not have any of the material upon which that original decision was based. Rather, HUD simply contended that the earlier decision was "incorrect."

HUD thereby repudiated a nine-year old, duly delegated decision of its Boston Regional Administrator upon which Petitioner relied in proceeding with the Project. The district court found HUD's action constituted an impermissible *reduction* in contract rents contrary to the Congressional mandate of § 1437f(c)(2)(C) that contract rents not be reduced unless refinancing was involved, which was not the case here. The district court relied upon decisions of three Circuit Courts of Appeals, the Fourth, Tenth and Fifth, that uniformly determined that this provision constitutes a blanket prohibition on HUD reductions in contract rents.

Petitioner also challenged HUD's use of outdated, lower Fair Market Rents in calculating the initial contract rents, when it was under Congressional direction to issue such FMRs "at least annually." The issue raised below was whether that claim was timely filed. Under the applicable limitations period, the claim was timely if calculated from the date of execution of the final Housing Assistance Payments Contract.

The Operation of the Section 8 Program.

Under § 1437f(e)(2), the initial contract rents for the units are set at no more than the applicable "fair market rent," subject to certain adjustments. These contract rents are updated at least annually based upon HUD-determined adjustment factors relating to rents for the particular market area. Since tenants only pay rent according to their incomes, a key element in an owner's

participation in the Program is that HUD makes up the difference between actual rents paid by tenants and the contract rents established with HUD approval. HUD funds are provided under Annual Contributions Contracts with Public Housing Agencies (PHAs) that administer the Program and make the housing assistance payments to participating owners.

Following HUD's approval of a proposal from a PHA on behalf of an owner outlining the proposed rehabilitation work and its estimated cost, and prior to the start of construction, HUD must also approve a preliminary contract, *i.e.*, an Agreement to Enter into Housing Assistance Payments Contract (AHAP), between the owner and the PHA. The AHAP estimates and sets initial contract rents which pursuant to HUD regulations can be increased later, for instance, because of unexpected costs incurred during rehabilitation and for the correction of computation errors.

After rehabilitation of the housing units is completed and the PHA inspects the property, it enters into a final Housing Assistance Payments Contract with the owner. The contract sets the initial contract rent for each unit, according to size, to cover the cost of financing the rehabilitation work and of owning, maintaining, and operating the project. The contracts are reviewed and approved by HUD before they are effective.

Section 1437f(c)(1), 42 U.S.C., establishes guidelines for setting initial contract rents according to area fair market rents. Section 1437f(c)(2)(A) provides for annual adjustments to contract rents to reflect inflation. Section 1437f(c)(2)(B) provides for additional adjustments due to increases in property taxes, utility rates, etc., which were not otherwise covered under the § 1437f(c)(2)(A) adjustment. Section 1437f(c)(2)(C) provides that such adjustments "shall not result" in material differences between market rentals and the subsidized rents.

During the 1980s, it appeared that HUD was relying on § 1437f(c)(2(C) not only to deny annual rent increases but to reduce rents when HUD studies indicated that market rents were lower than those being charged for comparable unassisted housing. Thus, in 1987, Congress amended § 1437f(c)(2)(C) to prevent HUD from reducing contract rents and undermining investor expectations that were critical to continued owner participation in the Program.

The 1987 amendment, in pertinent part, provides that:

> The Secretary **may not reduce the contract rents in effect on or after April 15, 1987**, for newly constructed, substantially rehabilitated, or moderately rehabilitated projects assisted under this section . . . **unless the project has been refinanced in a manner that reduces the periodic payments of the owner.** (Emphasis added)

HUD, nevertheless, attempted to limit the scope of this prohibition under § 1437f(c)(2)(C) on the basis that, in mandating changes, it was only correcting "errors" in setting the initial contract rents and through various other interpretations of that section's applicability. This led to a series of cases resulting in decisions by three other Circuit Courts of Appeals, all of which repudiated HUD's efforts to avoid the statute's restriction on contract rent reductions.

These decisions rejected HUD arguments that the restriction on reductions applied only to: (1) the annual prospective rent adjustments and not to correction of alleged errors in establishing the initial contract rents; and (2) that HUD's post-audit authority was plenary power to audit and redo calculations of earlier contract rents based upon alleged errors.

In this case as well, HUD attempted to reduce the initial contract rents on the basis of alleged errors in establishing them.

HUD would differentiate its actions here from the holdings in those Circuit Courts of Appeals' decisions by claiming that it only wants to use those reductions to "offset" otherwise required increases in the contract rents.

Trafalgar's Request for Contract Rent Increases.

Prior to undertaking the rehabilitation work, the HUD Boston Regional Administrator, pursuant to specifically delegated authority, established a maximum for the initial contract rents for the area in which the Project was located. In reliance upon that decision, Petitioner borrowed $11 million from the Massachusetts Housing Finance Agency, began rehabilitation of the Project, and entered into the preliminary, *i.e.*, AHAP, contract for the Project.

Acting pursuant to the specific authority in the AHAP, the Section 8 Program statutes, and HUD regulations, Petitioner requested, after the rehabilitation work was completed, an increase in the initial contract rents on several grounds. These later adjustments were contemplated as part of, and were consistent with, the commitment HUD made to induce Petitioner and other owners to undertake moderate rehabilitation projects to provide housing for lower income families.

HUD conceded that two of Petitioner's grounds for increased contract rents were merited, in that HUD had used the wrong debt service constant in calculating the rents and certain unanticipated costs incurred in connection with the rehabilitation should be recognized. HUD, however, refused to provide the required increases because it claimed it had found that an error was committed by its Regional Administrator in setting the maximum for contract rents nine years previously. HUD's assertion that the Administrator's decision was "incorrect" was based only on

conjecture, since the applicable data he relied upon in making his decision was no longer available.

HUD, therefore, repudiated the decision of its Regional Administrator in Boston, who was duly delegated to act on HUD's behalf. This commitment by the Regional Administrator, along with the ability to have the final initial contract rents calculated accurately and authorized unforeseeable costs recognized in such calculations, were essential to Petitioner's proceeding with the Project.

In attempting in this manner to offset conceded increases required in contract rents, HUD recalculated and reduced the initial contract rents in violation of the explicit language in § 1437f(c)(2)(C) that it may not reduce contract rents. This provision was enacted by Congress to ensure that settled investment expectations were respected and to prevent HUD-initiated rent reductions.

The District Court Decision.

Petitioner filed a declaratory judgment action in the United States District Court for Massachusetts alleging violations of the Administrative Procedures Act, in that HUD arbitrarily and capriciously refused to calculate properly Petitioner's authorized request for contract rent increases for the Project. The PHA and the PHA's contract administrator for the Project were also named as defendants.

The matter was submitted on cross motions for summary judgment. The district court ruled HUD had acted arbitrarily and capriciously in refusing in the calculation of the rents to consider various costs incurred in the rehabilitation of the Project, in failing to correct a computational error, in reducing the Project's rents by erroneously classifying a State loan as a grant, and in attempting to offset required increases by deducting for alleged errors in the

Regional Administrator's determination of the maximum for contract rents.

The district court also determined that the six-year statute of limitations barred Petitioner's claim that HUD should have used 1986 rather than the lower 1985 FMRs, because the claim accrued no later than the date the applicable 1986 FMRs were published and not the later date of execution of the final HAP Contract. On that basis, the court never reached the merits of that claim for an increase in contract rents.

The Court of Appeals Decision

The First Circuit Court of Appeals reversed the district court finding that HUD was arbitrary and capricious in denying Petitioner's request to include rehabilitation costs incurred prior to the effective date of the preliminary contract, *i.e.*, the AHAP, and in attempting to offset the required increases in contract rents by the alleged error in the Regional Administrator's determination. It sustained the district court's finding that HUD's classification of the State loan funds as a grant was arbitrary and capricious.

The Court of Appeals also sustained the district court's decision that the challenge to HUD's use of lower 1985, rather than the 1986, FMRs was barred, even though Petitioner had filed suit within six years of executing the final HAP Contract, the date on which all events necessary to fix HUD's liability had occurred.

SUMMARY OF ARGUMENT

1. Petitioner's claims involving HUD's failure to increase contract rents in defiance of the clear and unambiguous language of 42 U.S.C. § 1437f(c)(2)(C) are fully supported by the decisions of three other Circuit Courts of Appeals, the Fourth, Tenth and Fifth,

to whom analogous efforts by HUD to reduce contract rents were presented. All those courts found Congress intended to prohibit just the actions HUD has taken in this case, which the court below permitted.

The decision challenged by Petitioner would allow HUD to reduce the initial contract rents as a means of offsetting increases to which Petitioner was fully entitled under the applicable provisions of the Section 8 Program. Not only is the court below's decision in conflict with the other circuits on this issue, its interpretation would frustrate the clear Congressional intent that generated this amendment to the Section 8 Program. Congress acted to stop HUD's continuing efforts to reduce its housing assistance payments, frustrating the investment-based expectations of participating property owners who, in turn, had made their property available to house lower income tenants.

HUD's action here is analogous to that which led to legal challenges to HUD's prior attempts unilaterally to impose reductions in initial contract rents. This Court's grant of *certiorari* to review that issue would ensure consistency in the circuits on interpretation of a statute dealing with the federal government's major housing program involving private sector participation, which three other Circuit Courts of Appeals have found to be a clear and unambiguous prohibition on such reductions in contract rents.

2. The court below, in reversing the district court's decision upholding the statutory restriction on reductions, permitted HUD to repudiate, nine years after the fact, a duly authorized decision of its Boston Regional Administrator. In doing so, the court allowed the agency to revisit and "correct" a decision simply on HUD's unsupported assertion that the decision was erroneous.

Permitting an agency to repudiate a properly delegated decision is inconsistent with well established legal doctrine of this

Court that makes such delegated determinations binding on the agency. This Court should grant *certiorari* to review this ruling which could have far-reaching, adverse consequences for anyone trying to conduct business with HUD, or with any other federal agency.

3. Finally, the decision of the court below improperly sets the time in which a claim under the APA can be brought. The court held that the time began to run no later than the date on which the applicable 1986 FMRs were issued, several years prior to the execution of the final HAP Contract.

It was only when the final HAP Contract was executed that Petitioner's claims accrued, since until then the precise terms of the Contract were not set by HUD and it had not made the decision whether it would grant the contract rent increases requested by Petitioner. Therefore, this Court should also grant *certiorari* to provide guidance on this important issue regarding the timely filing for review of Administrative Procedures Act ("APA") actions.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THREE OTHER CIRCUIT COURTS OF APPEALS

The decision of the court below conflicts with decisions in the Fourth, Fifth, and Tenth Circuit Courts of Appeals as to the interpretation of §1437f(c)(2)(C)'s express language:

> The Secretary *may not reduce* the contract rents in effect on or after April 15, 1987, for newly constructed, substantially rehabilitated, or moderately rehabilitated projects assisted under this section (including projects assisted under this section as in effect prior to November 30, 1983), unless the project

> has been refinanced in a manner that reduces the periodic payments of the owner. (Emphasis added)

Here, HUD concedes it is *reducing* the initial contract rents because of an evidentially unsupported assertion that an error occurred in setting the initial maximum for contract rents. While the decisions of three other courts of appeals and at least five district courts have rejected HUD authority to do so, the decision of the court below in this case would permit HUD to reduce contract rents by offsetting otherwise required increases in contract rents under the Program. Not only would HUD be permitted to flaunt the very provisions prohibiting it from reducing contract rents, the court below's decision would allow HUD to ignore conceded bases on which the contract rents should have been increased.

In an evident attempt to balance or offset what the court below characterizes as two errors HUD "discovered," it would allow HUD to reduce the initial contract rents. The court's analysis seems to have assumed that there is evidence as to the basis on which HUD's Regional Administrator made his decision, and that the error actually occurred. Yet, HUD concedes that it has no direct evidence to support its contention of error, since the relevant documents on which basis the decision was made are no longer available.

HUD has made analogous arguments regarding errors in setting contract rents, but the decisions of the other circuits have rejected them. As the Fourth Circuit stated in *Foxglenn Investors Limited Partnership v. Cisneros,* 35 F.3d 947, 952 (4th Cir. 1994),

> Rather, HUD is attempting in this case to reduce rent payments primarily on the ground that it has decided that the payments to which it earlier assented exceed those that FGI should reasonably expect to receive. Reduction of rents for

such reasons is precisely what Congress proscribed in section 1437f(c)(2)(C).

The district court in this case, appropriately in light of the statutory language, considered the reduction attempt separately from the request for increases. As the court below described the district court action:

> Having found that HUD was required to correct the debt service constant, the district court went on to consider the exception rent mistake. It determined that correcting that error would result in a reduction contrary to § 1437f(c)(2)(C)'s mandate. The net result of the district court's ruling left HUD correcting the debt service error, but Trafalger continuing to benefit from the exception rent error. (Appendix at 17a)

It is submitted that Congress' prohibition on reductions had exactly that objective when Congress enacted the language of § 1437f(c)(2)(C). The court below, however, somehow felt it should balance what it refers to as two errors, yet its interpretation of the statute would render the Congressional intent meaningless in every instance when additional increases were called for under the HAP Contract and the Program.

HUD's contentions in this matter are just another in a number of contortions it has engaged in to avoid the clear intent of the rent reduction prohibition. If HUD has a complaint about the language, its recourse lies with Congress, not in an attempt to subvert clear legislative language.

To support its analysis, the court below endeavors to justify its position by attempting to parse the language "in effect" in the phrase, "[t]he Secretary may not reduce the contract rents in effect on or after April 15, 1987." The court below suggests that HUD was only restricted as to the contract rents it had previously

approved, but not in denying the increase HUD concedes it was obligated to make.

Since HUD suggested it would abide by the status quo here, the court below decided that if the reduction only deleted the increased rents already justified under the statute, HUD regulations and the HAP Contract, offsetting the increases by reducing the initial contract rents was not really a reduction within the terms of § 1437f(c)(2)(C).

In contrast, the Fourth Circuit in *Foxglenn* noted that following audits conducted in 1992, HUD had attempted to impose rent rollbacks on Foxglenn Investors Limited Partnership ("FGI") by reducing FGI's future rent payments so HUD could recover alleged overpayments in initial contract rents HUD then contended were in error.

The Fourth Circuit found, at 35 F.3d at p. 949, that the language in § 1437f(c)(2)(C):

> was added to section 1437f(c) in response to arbitrary and *ad hoc* rent reductions instituted against owners participating in the Moderate Rehabilitation Program in the 1980s.* By its plain language, the rent-reduction bar in section 1437f(c)(2)(C) prohibits HUD from unilaterally reducing contract rents, except when a project refinancing reduces the owner's periodic payments. Given that FGI has not refinanced the Foxglenn Apartments complex, section 1437f(c)(2)(C), if applicable, plainly bars HUD from ordering the rent rollbacks at issue in this case.

---

*Indeed, when HUD continued to reduce contract rents even after this amendment was passed, Congress, frustrated by HUD's intransigence, amended the statute again only nine months later to ensure that any owners whose rents had been

reduced in violation of section 1437f(c)(2)(C) would have their initial rents reinstated and their shortfalls under the reduction reimbursed. *See* U.S.C. § 1437(c)(2)(C) ("Any maximum monthly rent that has been reduced by the Secretary after April 14, 1987, and prior to [the enactment of this sentence] shall be restored to the maximum monthly rent in effect on April 15, 1987 . . . . "); *see also* H.R. Rep. No. 100-718(I), 100th Cong., 2d Sess. at 43 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4395, 4426 ("It is the intent of Congress to take away HUD's right to make rent reductions absent a refinancing, regardless of whether or not there was a negative factor.")

Of particular reference here to HUD's current iteration of its interpretation of the statute in this case, is the Fourth Circuit's statement, at 35 F.3d at p. 951:

> Even were we to accept that section 1437f(c)(1) authorizes HUD to set the initial contract rents, we would be hesitant to agree in the absence of express statutory language or other authority that the power to set rents necessarily includes the extraordinary power to alter unilaterally the contractual obligations of third parties. We would be especially reluctant to agree that Congress implicitly conferred such power where, as here, HUD is attempting to reduce rents for reasons analogous to those underlying the unilateral, arbitrary rent reductions that prompted Congress to add the rent-reduction bar in the first place. Just as HUD in the 1980s attempted to invoke its annual adjustment authority to reduce rents *ad hoc* based on its comparability studies, *see* H.R. Rep. No. 100-122(I), 100th Cong., 1st Sess. at 32 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3317, 3348 ("HUD field offices have been making capricious and individualized rent reductions . .

> . on an ad hoc and arbitrary basis."), so also here it attempts to use its section (c)(1) authority to reduce rents for alleged "errors" that are attributable in large part, if not wholly, to unpredictability in the market and inevitable market fluctuations...

Equally applicable to HUD's attempt here to distinguish its use of the reduction to offset an otherwise required contract rent increase, the court in *Foxglenn* stated at p. 950:

> Finally, we believe that HUD's asserted distinction between an "adjustment" and a correction of the contract rent, a distinction central to HUD's statutory argument, is a false distinction. In a correction, no less than in an adjustment, there can occur a reduction in rent. And it is reductions in rent that are expressly proscribed by section (c)(2)(C).

Just as in Petitioner's case here, any reduction in rent not arising from a refinancing is prohibited under that provision. The *Foxglenn* court supported this conclusion, stating, at pp. 950-51:

> In sum, the language of the rent-reduction bar is most naturally read as a blanket prohibition, and we are unprepared to say that such expansive language is attributable to congressional imprecision. We believe it far more likely that this language was chosen to effectuate what appears to have been the congressional purpose in enacting the bar, namely to prevent HUD from mandating post-agreement rent-reductions on an *ad hoc* basis, *thereby unsettling settled investment expectations*. (Emphasis added)

Otherwise, as the *Foxglenn* court concluded at p. 951:

> A party to a HAP contract could never rely on the contract rents as fixed, as Congress intended, were the contract subject to change because of a factor so mutable as the perceived "foreseeability" of change orders.

In a similar vein to the decision of the Fourth Circuit, the Tenth Circuit in *Terrace Housing Associates, Ltd. v. Cisneros*, 32 F.3d 461, 463 (10th Cir. 1994) found:

> that the 1987 amendment explicitly prohibits all reductions of contract rent. There is no distinction made for "annual adjustments of rent" and "corrections of initial contract rents" and, contrary to the Secretary's contention, the amendment is not ambiguous.

As noted approvingly in *Terrace Housing* at pp. 463-64:

> In the factually similar case of *Linden Housing Associates Ltd. v. Cisneros,* Case No. CV-N-92-358-HDM (D.C. Nev. 1993), cited and relied on by the district court in *Terrace Housing Associates*, the court found that rent rollbacks were barred, stating:
>
> > After reviewing the history of the pertinent regulations, the Court is satisfied that the scope of HUD's "post audit" authority is limited to verifying the owner's cost and mortgage loan certifications and recalculating the contract rents if any material errors are discovered in those certifications. However, this "post audit" authority is not a grant of plenary power to audit and redo calculations of contract rents based upon alleged errors unrelated to the verification of the owner's cost and mortgage loan certifications.
> >
> > In this case, HUD is not attempting to rollback the rents based on alleged errors in the owners' certifications. Instead HUD contends that an alternative methodology should have been applied to determine the initial contract rents, and it is attempting to invoke the "post audit" authority to recompute the rent using that alternative formula. However, the "post audit" authority conferred

> by HUD's regulations and by the corresponding provision in the . . . Contract does not extend this far. Accordingly, the rent rollbacks are unauthorized and are void for that reason. (Footnote omitted) (Slip opinion at p. 4)

The Fifth Circuit in *2225 New York Avenue Ltd. v. Cisneros,* 38 F.3d 210, 211 (5th Cir. 1994), clearly understood the economic implications of HUD's unauthorized efforts to roll back contract rents and similarly rejected HUD's efforts to lower its housing assistance payments to owners by attempting:

> retroactively to "correct" the initial rents provided for in the transaction. There's no contention that the project has been refinanced. The effect of this "correction" would be to lower the rents appellee was permitted to charge its low-income tenants, and thus to disadvantage appellee economically.

Perhaps best reflecting the conflict between the court below's decision for which this Petition seeks *certiorari*, is the conclusion of the Fifth Circuit, at p. 211:

> On appeal, both parties assert arguments essentially identical to those weighed in two other recent cases before courts of appeals. Both of those courts of appeals construed the above-quoted statutory language to forbid the position that HUD has taken. *Terrace Housing Associates Ltd. v. Cisneros,* 32 F.3d 461 (10th Cir 1994); *Foxglenn Investors Limited Partnership v. Cisneros*, 35 F.3d 947 (4th Cir. 1994). We agree with the analysis and conclusions of our sister circuits and adopt them as our own. Further writing by the court would be pointless. For these reasons, the judgment of the trial court is AFFIRMED.

This Court should grant *certiorari* to provide consistency in the circuits on the interpretation of the 1987 amendment.

II. THE DECISION BELOW IS CONTRARY TO THE DOCTRINE THAT A FEDERAL AGENCY IS BOUND BY THE DECISION OF ITS DULY DELEGATED OFFICIAL

The court below, in reversing the district court's decision that upheld the statutory restriction on reductions, permitted HUD to repudiate nine years later a duly authorized decision of its Boston Regional Administrator. In doing so, the court below allowed an agency to revisit and "correct" a decision solely on its unsupported assertion that the decision was erroneous. Allowing a federal agency to repudiate a decision by its duly delegated official is inconsistent with well established legal doctrine and could have far-reaching, adverse consequences for anyone trying to conduct business with HUD, or any other federal agency.

In making its decision, the court below overlooked the firmly established principle that administrative authority, once delegated, binds the delegating public official and, as such, precludes the delegator's review and revision of decisions made within the scope of the delegated authority. This is particularly true when, as here, there is a complete absence of a retained power to review and revise.

The rationale underpinning this rule of law is compelling. Notwithstanding the limitation on supervisory discretion and administrative review power that the rule encompasses, it finds firm justification in the need to foster public confidence in the integrity of the administrative process and to preserve the finality on which changes of position by affected parties are understandably based. *Superior Oil Co. v. Udall*, 409 F.2d 1115, 1119-20 (D.C. Cir. 1969) (see the analysis of Judge (later Chief Justice) Burger holding that Secretary of Interior was bound by decision of Department employee rejecting bid for oil and gas leases because authority to reject bids had been delegated to the employee). *See also United*

States v. Nixon, 418 U.S. 683, 695-96 (1974). (As long as regulation pursuant to which Attorney General delegated authority to Special Prosecutor was extant, the actions of the Special Prosecutor had the force of law and Executive Branch was bound thereby.)

That the delegatee may have decided erroneously cannot alter the controlling fact that he was empowered to make the decision and the delegator is bound thereby. As the Court held in *Larson v. Domestic and Foreign Commerce Corp*, 337 U.S. 682, 695 (1949), "... we have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so" *Accord, Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 455 (D.C. Cir. 1965) (the law is clear that an officer of the United States does not act outside his authority whenever he acts upon an erroneous decision of law or fact if he is empowered to make the decision).

The importance of this issue is graphically illustrated by the underlying time frame. This case does not involve an assertedly incorrect decision of a subordinate official followed by prompt review and rehearing by a supervisory federal official. Rather, almost nine years intervened between the decision of the Regional Administrator and its reversal.

A wide variety of situations exist in which detrimental changes of position and severe disruption of vested rights will inexorably arise when persons act on the strength of this kind of longstanding federal administrative ruling, only to find secure economic and financial decisions and other benefits unexpectedly swept away. In fact, major financial commitments are made daily by State and local governments and by private parties in reliance on authority duly delegated to HUD and other federal officials to bind their respective agencies.

Unless the court below's decision is overturned, the confidence of the public in the administrative process will be seriously eroded. Therefore, this Court's grant of *certiorari* is necessary to prevent the undermining of public confidence in the efficacy of the hundreds, if not thousands, of decisions made each year by HUD and other federal officials pursuant to specific delegations of authority to such officials.

As the three other Circuit Courts of Appeals interpreting § 1437f(c)(2)(C) noted, such a repudiation of a contract rent determination by a duly delegated HUD official is not even authorized under the authority cited by HUD. The decision of the court below would approve just such unauthorized revisions in economic decisions that Congress was clearly concerned with preserving when it enacted section 1437f(c)(2)(C).

III. THE DECISION BELOW IMPROPERLY ESTABLISHES THE DATE ON WHICH AN APA CLAIM ACCRUES

The decision of the court below improperly sets the time when a claim under the APA can be brought as running from no later than the date that the applicable 1986 FMRs were published. At that time, however, several years prior to the execution of the HAP Contract, the precise terms of the contract had not been set and HUD had not finally determined whether it would recognize the basis for the contract rent increases requested by Petitioner.

Until the final HAP Contract was executed on April 17, 1990, Petitioner's claim against HUD could not have accrued. In general, a claim does not accrue until all the events necessary to fix the liability of the defendant have occurred. *United States v. Cocoa Berkau, Inc.*, 990 F.2d 610, 613 (Fed. Cir. 1993). It was not until

signing the HAP Contract that Petitioner was able to fix HUD's liability.

The relevance of the date of execution of the HAP Contract as the basis for challenging HUD's actions under the APA is supported by the fact that relevant HUD regulations allow for changes to the contract rent for certain limited circumstances, relevant here, including unexpected changes in rehabilitation costs, or to correct errors in computation. The court below simply failed to recognize that changes in rehabilitation costs and correction of errors in computation, *e.g.*, using an incorrect debt service constant for calculations, were applicable here. This Court should grant *certiorari* to provide guidance on this important issue regarding timely initiation of judicial review of APA actions.

CONCLUSION

This Court should grant *certiorai* in this case to resolve and provide guidance on important issues relating to interpretation of 42 U.S.C. § 1437f(c)(2)(C), on whether an agency can subsequently repudiate a decision made by the person to whom it was delegated, and on when a cause of action under the APA accrues in HUD's Section 8 Program, a significant element of this nation's delivery of housing assistance to lower income persons.

Respectfully submitted,

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